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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: MAR 3 0 2012 OFFICE: NEBRASKA SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a recycling plant. It seeks to employ the beneficiary permanently in the United States as a recycling manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the alien employment certification. Specifically, the director determined that the beneficiary did not have the required five years of experience in the job offered.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected

[1] After March 28, 2005, the correct form to apply for alien employment certification is the Form ETA 9089.

to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(k)(3) provides:

> (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> > (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> >
> > (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Here, the labor certification was filed on October 26, 2001. The terms of the labor certification require a bachelor's degree in management or a related field and five years of experience as a recycling manager.[2] The duties of the position are to "negotiate with vendors, train in-house personnel, and oversee collection & processing operations." Special requirements enumerated on the labor certification include "5 years experience in purchasing, selling paper, plastic & mtal [sic]."

On the Form ETA 750B, the beneficiary stated that he worked with [redacted] from February 1995 to the date the labor certification application was signed (October 16, 2001) as a recycling manager. He described the duties of the position as "[u]sed computers to analyze the contents of scrap metal. Managed and ran day-to-day operation of plant."

The petitioner submitted a September 1, 2008 letter from [redacted]. to establish the beneficiary's five years of work experience as a recycling manager. The letter stated that the beneficiary worked from February 1, 1995 to July 31, 2005 as a purchasing manager with the specific job duties of "purchasing and inspecting metal materials. Analyzing the needs of market in metal recycling area. Traveling between U.S.A., China, and Taiwan for Purchasing and inspecting metal materials."

The record indicates that the petitioner filed a previous Form I-140 for the beneficiary dated September 12, 2003, which was denied on December 13, 2004. The director notified the petitioner that a routine investigation into the beneficiary's claimed employment in Taiwan as a recycling manager with [redacted] was conducted on October 14, 2004. The overseas

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[2] The record reflects that the beneficiary has a Bachelor of Science degree in Business Administration/Management from [redacted] dated August 7, 1993.

investigation showed that [redacted] is a family business, and that the beneficiary is the son-in-law of the company's president. Further, local records indicated that the beneficiary's salary level was that of a basic level employee, not a manager's. Finally, the director stated that Taiwanese exit/entry records indicated that the beneficiary "spent the majority of his time in the United States or overseas and only three months a year, at the most, in Taiwan up to October 2001 when he applied for EB3 immigration status."

The record also contains the following evidence relevant to the beneficiary's work experience as a recycling manager:

- The Form G-325 signed by the beneficiary on March 14, 2008 under penalty of perjury and submitted by the beneficiary with his Form I-485 stated his dates of employment with [redacted]. as August 1995 to November 2005 and that his title with the company was marketing manager.
- A letter from [redacted] letterhead, dated July 21, 2004 and submitted with the previous Form I-140 stating that the company had employed the beneficiary since February 1, 1995 as a recycling manager with the major duties of "managing and running day-to-day operation of [the] plant. He is also responsible for analyzing the contents of scrap metal and other recycling materials."[3]

The director concluded in adjudicating the previous petition that the beneficiary could not have been involved in the "day-to-day operations of [the] plant" as stated in the July 21, 2004 letter from [redacted] as he was insured by the labor ministry for a low-level salary and because he spent too much time abroad during the claimed employment. The petitioner appealed this decision to the AAO. In a decision dated October 24, 2006, the AAO dismissed the appeal specifically agreeing that the beneficiary's extended absences from Taiwan, although claimed as company business, were incompatible with the job description provided in the letter. The AAO noted that the beneficiary may have been employed by [redacted] in another capacity; however, such employment would be inconsistent with what had been claimed and the petitioner provided no evidence to resolve those inconsistencies pursuant to *Matter of Ho*.[4] As a result, the AAO concluded in adjudicating the appeal of the previous denial that the inconsistencies in the record made it impossible to conclude that the beneficiary had the required experience as of the priority date.

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[3] With the previous Form I-140, the petitioner submitted an October 14, 2001 letter from [redacted] stating that the beneficiary worked as a recycling manager from February 1, 1995, but that letter did not list details of the beneficiary's job duties. The AAO notes that the letters from [redacted] are internally inconsistent in that the more recent letter lists the beneficiary's duties as a purchasing manager, which are different than those in the earlier letter, where the duties were characterized as those of a recycling manager.

[4] "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In this case, the director found that the September 1, 2008 letter from [redacted] did not overcome the discrepancies of record relating to the beneficiary's absences from Taiwan and his labor status as a basic level employee. Despite being on notice of the inconsistencies in the record relating to the previous petition, the petitioner submitted no evidence with the current Form I-140 or on appeal to resolve such inconsistencies. The September 1, 2008 letter from [redacted] states that the beneficiary traveled on company business; however, the letter provides no details or supporting explanations for the beneficiary's extended absences from Taiwan during the period of claimed qualifying employment. Nor does the letter address the director's concern that the beneficiary was categorized by the labor ministry in a basic level of employment rather than managerial. On appeal, counsel does not address these concerns of the director. Counsel quotes the September 1, 2008 letter as proof that the beneficiary has the experience requirements of the labor certification. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

[redacted] letter dated September 1, 2008 submitted with the current petition describing the position and duties as a purchasing manager and the beneficiary's characterization of the position as a marketing manager on the Form I-485 create new inconsistencies with previous evidence of record such as the July 2004 letter and the beneficiary's Form ETA 750B indicating that the qualifying experience was as a recycling manager. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592. As the petitioner has failed to resolve the inconsistencies, the credibility of the evidence is called into question. The petitioner has not established that the beneficiary has the experience required by the terms of the labor certification.

On appeal, the petitioner failed to submit an explanation from [redacted] about the business affairs of the company requiring the beneficiary to be in the United States for most of the year during the period of qualifying employment. Nor has the petitioner attempted to establish that the beneficiary did not spend a significant amount of time in the United States during the qualifying employment from 1995 through 2001.[5] As stated by the director, because the beneficiary spent most of his time

[5] USCIS records indicate that the beneficiary spent at least 64 days in the U.S. in 1996, 264 days in 1997, 262 in 1998, 267 in 1999, and 98 in 2000. USCIS entry and exit records indicate that the beneficiary was in the United States during the following times:

Entry	Exit
Sept. 4, 1995	Not indicated
Jan. 27, 1996	Feb. 11, 1996
Nov. 7, 1996	Dec. 6, 1996
Dec. 11, 1996	March 25, 1997
April 7, 1997	Sept. 4, 1997
Dec. 30, 1997	March 15, 1998

in the United States from 1995 – 2001, and considering that the petitioner has not established the business nature of the absences from Taiwan, the petitioner has not established that the beneficiary has the five years of required experience as a recycling manager at a plant in Taiwan.

The petitioner also submitted a September 1, 2008 letter from [redacted], which stated that the beneficiary worked from January 1, 1985 to July 31, 1989 as a sales representative. The description of job duties include: "Providing customer's shipment door to door quotation and service. Calculating container's space for the shipment. Negotiating container rate with shipping company. Making arrangement for trucking and packing workers. Bill of Landing documentation." This experience does not encompass most of the duties of a recycling manager and does not include the specific requirements of the labor certification of "5 years experience in purchasing, selling paper, plastic & mtal [sic]" and is thus inadequate to demonstrate the required experience. On appeal, counsel admits that the beneficiary's position with [redacted] was not managerial, but asserts that the job "contributes to his ability to work with negotiating with vendors." Although certain prior positions may aid a worker to perform his job duties, the beneficiary must meet the terms of the labor certification in order to qualify for the position. The beneficiary's position with [redacted] does not meet the specific requirements as set forth in the labor certification. In addition, the beneficiary failed to list this experience on Form ETA 750B. That form requires the beneficiary to list all jobs related to the position under consideration. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in *dicta* notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). The beneficiary failed to list this experience on the Form ETA 750B, casting doubt on the authenticity of the evidence. This additional evidence does not establish the beneficiary's qualifications for the position.

The petitioner submitted a letter from its President stating that the beneficiary began working for the petitioner on November 1, 2005 as recycling manager with the job duties of "Providing company management with information needed to make decision on promotion, distribution, design, and pricing of company services. Compiling collected data, evaluating it, and then making recommendations to clients upon findings. Conducting opinion research to determine public attitudes on various issues. Exporting matters." To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date in this matter is October 16, 2001, so any experience gained with the petitioner from 2005 onward is not evidence of the beneficiary's experience as of the priority date.

March 30, 1998	July 24, 1998
Oct. 21, 1998	Jan. 21, 1999
Feb. 27, 1999	May 27, 1999
June 29, 1999	Sept. 2, 1999
Oct. 11, 1999	Jan. 25, 2000
Feb. 16, 2000	May 1, 2000

The evidence does not demonstrate that the beneficiary has five years experience as a recycling manager with specific experience in purchasing, selling paper, plastic, and metal. As such, the beneficiary is not qualified to perform the duties of the position as of the priority date and the petition is not approvable.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.